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PATENT APPLICATION
Attorney Docket No: 200312175-1
Application No. 10/765,628

**IN THE
UNITED STATES PATENT AND TRADEMARK OFFICE**

Inventors: Timothy D. Strecker et al. **Examiner:** Melvin Cartegena
Application No: 10/765,628 **Group Art Unit:** 3754
Filing Date: January 27, 2004 **Confirmation No:** 2262
Title: DISPENSING APPARATUS INCLUDING A CERAMIC BODY

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**PETITION TO DIRECTOR UNDER 37 CFR §1.181 and
PETITION FROM REFUSAL TO ADMIT AMENDMENT UNDER 37 CFR
§1.127**

Dear Sir:

Applicant petitions the Director to review and enter Applicant's amendment to the claims mailed 25 June 2007.

Remarks

This Petition is in response to Examiner's refusal to enter Applicant's amendment to claims 1, 38, and 42 mailed 25 June 2007 in response to Examiner's Office Communication mailed 23 February 2007 in which Examiner withdrew claims Applicant elected. This petition is being filed within two months of the mailing date of the action from which relief is requested. Thus, the petition should be considered under 37 CFR §1.127 and 37 CFR §1.181.

Applicant amended claim 1 to disclose a dispensing apparatus, comprising:

"a ceramic body having a chamber, said chamber including a first portion and an outlet portion, said ceramic body having:
a first inlet channel delivering a first component viscoelastic fluid to said chamber, and
a second inlet channel delivering a second component viscoelastic fluid to said chamber, said first and said second inlet channels disposed to hinder interaction between said first and said second component viscoelastic fluids in either inlet channel, wherein rotation of said at least one feed screw mixes said first and said second component viscoelastic fluids forming a viscoelastic fluid product at least one inlet channel fluidically coupled to said chamber; and
at least one feed screw having a helical thread disposed in said chamber, wherein rotating said at least one feed screw urges a viscoelastic fluid in said chamber toward said outlet portion."

Applicant amended claim 38 to disclose a dispensing apparatus, comprising:

"a ceramic body having a chamber;
means for introducing a first component viscoelastic material to said chamber;
means for introducing a second component viscoelastic material to said chamber; and
means for urging said viscoelastic material to an outlet portion of said chamber."

Applicant amended claim 42 to disclose a method of operating a dispensing apparatus, comprising:

"introducing a first component viscoelastic fluid to a chamber through a first inlet, said chamber formed in a ceramic body;
introducing a second component viscoelastic fluid to said chamber through a second inlet;

rotating at least one feed screw disposed in said chamber a pre-selected amount;
urging said viscoelastic fluid to an outlet portion of said chamber; and
dispensing a pre-selected quantity of said viscoelastic fluid from the dispensing apparatus."

Applicant respectfully submits that Examiner's refusal to enter Applicant's amendments to claims 1, 38, and 42 is improper based on Examiner's improper restriction requirement; or in the alternative, if Examiner's restriction requirement is deemed proper, then based on fairness that Examiner cannot withdraw claims Applicant has elected without first providing Applicant the ability to address the issues raised by Examiner after Applicant responded completely and in good faith. Examiner had numerous choices that would have prevented the situation which has occurred here. Examiner could have called Applicant and attempted to resolve the misunderstanding on the phone; Examiner could have given a non-responsive notice as Examiner is clearly able to do and has done in response to Applicant's amendment which is being petitioned; Examiner could have responded with a new species restriction identifying the claims Examiner considers reads on each species. All of these would have lead to the fair result of Applicant being given the opportunity to elect the claims to be prosecuted in an informed manner rather than the arbitrary manner Examiner has chosen to take. Applicant continues to argue Examiner does not have authority to decide which claims Applicant may prosecute in an uninformed manner.

Applicant elected a species for prosecution and made a good faith attempt to identify all of the claims that Applicant believed read on the elected species. Examiner, on the other hand, in disagreeing with Applicant's interpretation of the claims reading on the elected species, made no attempt to bring such disagreement to Applicant's attention prior to an Office Action on the Merits. By ignoring the issues raised by Examiner's interpretation of the claims reading on the elected species and mailing a First Office Action on the Merits Examiner prevented Applicant from addressing the issues raised after Applicant responded, and forced Applicant to prosecute the claims Examiner has essentially elected. Applicant asserts this is an egregious misuse of the restriction requirement regardless whether Examiner's

restriction requirement is proper and is clearly unfair to Applicant's right to prosecute the claims Applicant chooses to prosecute if Applicant had been allowed to make an informed decision. Applicant argues based on fairness and Examiner's arbitrary handling of this issue Applicant's claim amendments should be entered regardless of whether or not Examiner's restriction requirement is found to be proper.

In addition, regardless whether the restriction requirement is proper, Applicant also asserts that once Applicant elected Species 7 then in identifying claims that read on or are included with that species are all claims that are not mutually exclusive of Species 7. Applicant argues this is separate from whether or not the restriction requirement is proper but is simply the question whether or not claims can read on more than one species. Applicant asserts clearly without any doubt this is so. Thus, Applicant argues since the elements/limitations to a first inlet channel and a second inlet channel are clearly neither mutually exclusive with nor incapable of being connected in at least the same design, operation, or effect with a heater, i.e. they are connected in at least one of the same design, operation or effect in regards to a dispensing apparatus having a heater, i.e. the heater has the same effect regardless whether there is a single inlet or two inlets. Therefore, Applicant asserts Examiner must enter Applicant's amendment to the claims mailed on 25 June 2007 separate from whether or not Examiner's restriction requirement is improper.

Applicant respectfully asserts Examiner misinterprets what claims may be included in an election. Examiner appears to argue that one cannot elect a species and then prosecute any claims that could also possibly be associated with a non-elected species. Applicant respectfully argues Examiner is clearly contradicting himself by prosecuting claims to unelected species. In addition, Applicant continues to argue Examiner by his very actions is demonstrating the egregious nature of Examiner's arbitrariness as to which claims Examiner is prosecuting. Applicant argues because Examiner choose to list seven different species Applicant had the right to elect Species 7 and then elect all claims that are not mutually exclusive of Species 7, i.e. Applicant is allowed to prosecute claims to either 1 inlet or two inlets because Species 7 is silent on the number of inlets and either 1 inlet or 2 inlets are capable of operating with

Species 7 disclosing a heater. This argument is separate from the propriety of Examiner's rejection but instead focuses solely on the issue of what claims read on a species regardless of what the other species Examiner has identified. Examiner appears to argue that in the instant case all 7 species are each mutually exclusive of each other and that no election of any species would allow claims to any other species to be prosecuted. This is per se improper because Species 1, 2 both show 1 inlet therefore, no matter which of these two species is elected claims to a single inlet may be prosecuted. Likewise Species 3-6 all show 2 inlets therefore, no matter which of these four species is elected claims to a two inlets may be prosecuted. Thus, Applicant argues since Figs. 8a and 8b do not show any number of inlets why is Applicant prevented from prosecuting claims to either 1 or 2 inlets? Applicant asserts the only reason Applicant is prevented from prosecuting claims to either 1 or 2 inlets is an arbitrary decision by the Examiner.

In contrast, Applicant argues Examiner could have presented, in what arguably may be at least a more proper restriction requirement, various groupings of species. Examiner then could have required Applicant to select a particular species from each group as is typically done in applications with multiple Markush claims. For example, Examiner could have asserted Applicant must choose between a Species with 1 or 2 inlets, and then further have required Applicant to choose between 1 or 2 feedscrews because 1 or 2 inlets can work with either 1 or 2 feedscrews etc. Applicant believes the analogy to multiple Markush claims highlights, regardless of the propriety of the restriction requirement, how Examiner is improperly refusing to enter Applicant's amendment. Applicant asserts Examiner cannot argue that by electing a species in one Markush group an applicant cannot also prosecute a species found in a different Markush group. Clearly this is proper and is done all the time and thus even were one has 7 species identified it is clear there will be times when by electing a particular species claims that read on a different species may also read on the species chosen and thus should be prosecuted.

Conclusion

For the reasons set forth above, Examiner's refusal to enter Applicant's claim amendment is unwarranted and the amendment should be entered. Applicant respectfully requests the Director enter Applicant's amendment mailed 25 June 2007.

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Respectfully submitted,
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Date: 20 November 2007